

# **EXHIBIT D**

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK  
2 -----X  
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3 UNITED STATES OF AMERICA, New York, N.Y.  
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4 v. 05 cr. 390 (SHS)  
4  
5 JOSEPH BONGIORNO, et al.,  
5  
6 Defendants.  
6  
7 -----X  
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8  
9 February 7, 2006  
9 3:40 p.m.  
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10  
10 Before:  
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11 HON. SIDNEY H. STEIN,  
12  
12 District Judge  
13  
13  
14 APPEARANCES  
14  
15 MICHAEL J. GARCIA  
15 United States Attorney for the  
16 Southern District of New York  
16 BY: ANTHONY BARKOW  
17 Assistant United States Attorney  
17  
18 KRAMER LEVIN NAFTALIS & FRANKEL, LLP  
18 Attorneys for Defendant Joseph Bongiorno  
19 BY: BARRY H. BERKE  
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20 STILLMAN & FRIEDMAN  
20 Attorneys for Defendant Patrick McGagh  
21 BY: MARJORIE PEERCE  
21 KARIN ORENSTEIN  
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23 Attorneys for Defendant Michael Hayward  
23 BY: JONATHAN PAUL BACH  
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1 APPEARANCES CONTINUED  
2 CLIFFORD CHANCE US, LLP  
2 Attorneys for Defendant Michael Stern  
3 BY: DAVID MEISTER  
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4 SERCARZ & RIOPELLE, L.L.P.  
4 Attorneys for Defendant Richard Volpe  
5 BY: MAURICE H. SERCARZ

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5 ROLAND GUSTAF RIOPELLE  
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7 Attorneys for Defendant Robert Scavone  
7 BY: ANDREW H. SCHAPIRO  
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9 Attorneys for Defendant Gerard Hayes  
10 BY: JASON BROWN  
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1 (Defendants not present)  
2 THE CLERK: United States v. Joseph Bongiorno, et al.,  
3 05 Cr. 390.  
4 Counsel, please state your names for the record.  
5 MR. BARKOW: Good afternoon, your Honor. Anthony  
6 Barkow on behalf of the United States.  
7 MR. BERKE: Good afternoon, your Honor. Barry Berke,  
8 of Kramer and Levin, on behalf of Mr. Bongiorno.  
9 MR. SCHAPIRO: Andy Schapiro, from Mayer, Brown, for  
10 Robert Scavone.  
11 MR. BACH: Jonathan Bach, from Kronish Lieb, for  
12 Michael Hayward.  
13 MR. MEISTER: David Meister, Clifford Chance, for  
14 Michael Stern.  
15 MR. BROWN: Jason Brown, from Ropes & Gray, for Gerard  
16 Hayes.  
17 MR. SERCARZ: Maurice Sercarz and Roland Riopelle for  
18 Richard Volpe.  
19 MS. PEERCE: Margie Peerce, from Stillman & Friedman,  
20 for Patrick McGagh.  
21 THE COURT: Good afternoon to all of you. Please be  
22 seated.  
23 I take it that all of you are waiving your clients'  
24 appearances today and that your clients are aware of all of  
25 that. Is there anyone who -- rather than all of you saying  
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1 yes, yes, yes, yes, yes, is there anyone who disagrees with  
2 that?  
3 (Pause)  
4 All right.

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5 I have reviewed the extensive papers filed on the two  
6 motions, that is, the Rule 16 motion for discovery filed by the  
7 defendants and the subsequent motion for a bill of particulars  
8 filed by defendants. I also have been reading the materials  
9 that you have been sending me in the past few days in regard to  
10 Judge Chin's thinking and Judge Baer and Judge Castel. It is  
11 always helpful to see what my colleagues are doing. I am  
12 prepared to rule on the outstanding motions. Unless there is  
13 anything that any of the parties wanted to tell me that's  
14 happened in terms of your discussions with each other, anything  
15 else that I should be aware of?

16 (Pause)

17 All right. Defendants have moved pursuant to Rule 16  
18 to compel the government to produce four different areas of  
19 documents. One is the display book screenshots for every  
20 alleged violation from October 1, 2002 as well as for other  
21 trades made by defendants. The second group is SEC materials  
22 concerning trading ahead and interpositioning. The third are  
23 the New York Stock Exchange documents concerning the definition  
24 and identification of intentional trading ahead and  
25 interpositioning; and the fourth is the number of alleged

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2 trading ahead and interpositioning violations by specialists in  
3 similarly busy stocks.

4 That's on the Rule 16 motion, and as I said, there is  
a separate motion for a bill of particulars.

5 Let's do it one by one.

6 The Stock Exchange has assembled at the government's  
7 request screenshots of what appeared on defendants' display  
8 books while they engaged in some of the trades at issue. The  
9 government asserts that each set of screenshots shows exactly  
10 what transpired on a specialist's display book during the  
11 course of an allegedly improper trade, and the government has  
12 turned over to the defense approximately 30 sets of screenshots  
13 per defendant which everyone agrees are a small fraction of the  
14 allegedly illegal activity that's charged here.

15 Pursuant to Rule 16, the defendants seek screenshots  
16 for all of the remaining alleged violations charged in the  
17 Indictment for which the Stock Exchange still has data. They  
18 seek the underlying data used to produce the screenshots, the  
19 software used to generate the screenshots, and screenshots for  
20 relevant trades material to the defense other than those  
21 identified in the Indictment.

22 Rule 16, you all know, applies to items that are in  
23 the possession, custody or control of the government. The  
24 screenshots themselves are not in the government's custody or  
25 control but, rather, are in the Stock Exchange's.

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2 Specifically, as far as I understand it, the requested  
3 screenshots actually don't currently exist but the data that  
4 can be used to generate them does, as well as the proprietary  
5 software that's needed in order to generate them. All of that  
6 is in the custody and control of the New York Stock Exchange.

7 The question, then, is whether "the government" in  
Rule 16 can incorporate the New York Stock Exchange. The

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8 Second Circuit has not defined "the government" for purposes of  
9 Rule 16. A leading case is *United States v. Giffen*, 379  
10 F.Supp.2d 337, 343 (S.D.N.Y. 2004). The government asserts  
11 that there has to be a joint investigation between the  
12 government and the third party here, the New York Stock  
13 Exchange, in order for Rule 16 obligations to apply to the  
14 government. See *United States v. Volpe*, 42 F.Supp.2d 204 at  
15 221, and *United States v. Upton*, 856 F.Supp. 727 at 749-50,  
16 *United States v. Guerrero*, 670 F.Supp. 1215 (S.D.N.Y. 1987).

17 The case law supports the defendants' position that  
18 Rule 16 applies to more than just joint investigations, and  
19 cases outside the Second Circuit also suggest that Rule 16  
20 extends beyond joint investigations. See *United States v.*  
21 *Santiago*, 46 F.3d 885, 894 (9th Cir. 1995), *United States v.*  
22 *Trevino*, 556 F.2d 1265 at 1272 (5th Cir. 1977). The case law  
23 supports the position that Rule 16 applies to more than joint  
24 investigations.

25 Here we know there was no joint investigation between  
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1 the government and the New York Stock Exchange. No Stock  
2 Exchange personnel participated in or attended any witness  
3 interview conducted by the government. The Stock Exchange was  
4 not involved in the government's charging decisions, and the  
5 Stock Exchange and the FBI agents did not work together,  
6 according to the information. I note that Judges Baer and Chin  
7 relied on those facts in determining that there was no joint  
8 investigation between the Stock Exchange and the prosecution.  
9 See *United States v. Foley* and *United States v. Delaney* and  
10 *United States v. Finnerty* and *United States v. Murphy*.

11 The question under these cases is whether the  
12 government has access to the screenshots. Interpreting  
13 "access" as defined in Webster's Third New International  
14 Dictionary is "permission, liberty or ability to enter,  
15 approach, communicate with or pass to and from." The  
16 government doesn't have the permission, liberty or ability to  
17 make use of the screenshot data without the compliance and  
18 agreement of the New York Stock Exchange. If the government  
19 absent a court order went to the Stock Exchange and asked that  
20 it produce the numerous screenshots requested by the  
21 defendants, the Stock Exchange certainly would be within its  
22 rights to refuse to do so. In this way, the relationship  
23 between the government and the Stock Exchange is similar to  
24 that between the state and federal officials in *United States*  
25 *v. Chavez-Vernaza*, 844 F.2d 1368 (9th Cir. 1987).

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1 I therefore conclude that the government does not as a  
2 legal matter have access to the screenshots. I therefore am  
3 denying defendants' first discovery request because under the  
4 applicable standard the screenshots do not fall within the  
5 parameters of Rule 16.

6 Now, that leaves the Rule 17 analysis. I have no  
7 subpoena before me, and I'm not going to rule on what would  
8 have happened if there were any such subpoena. The standards  
9 there would be different.

10 I can say that based on what I know so far, it strikes  
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11 me that the burden on the New York Stock Exchange in generating  
12 these screenshots, if there were such a Rule 17 subpoena, would  
13 be extremely high. Again, I repeat, I don't have a subpoena in  
14 front of me, there is no motion to quash the subpoena, but I  
15 wanted to give you a heads up on the Rule 17 issue as I see it  
16 now.

17 In addition, the government has offered to provide  
18 defendants with access to the software and data that can be  
19 used to generate screenshots for any trade that occurred on any  
20 of the dates for which the government has already produced  
21 screenshots. As I understand that, each defendant would then  
22 have the ability to generate sets of screenshots for every one  
23 of the trades that they made on any of the days from which the  
24 30 sets of screenshots per defendant that have already been  
25 produced were generated. That seems to me to make an awful lot

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1 of sense as a way to cabin this dispute, and it seems to me  
2 that the government's proposal to give the underlying data for  
3 those -- for all of the trades on the day on which they've  
4 already provided one of the 30 screenshots per defendant should  
5 be produced, and that is adequate in terms of the required  
6 screenshots.

7 The defendants then can try to test on that basis  
8 whether the chosen screenshots are truly representative  
9 samples. The defendants have the ability to come back to me if  
10 they have reason to believe that they are not truly  
11 representative, but at least that data will enable them to, I  
12 think, give a sense of whether or not they are truly  
13 representative.

14 Now, let's go to the second area, which is a request  
15 by the defendants for all SEC materials concerning trading  
16 ahead and interpositioning. This is because the SEC has  
17 conducted its own investigation into trading ahead and  
18 interpositioning by specialists at the New York Stock Exchange,  
19 including the seven defendants.

20 Indeed, the SEC instituted administrative proceedings  
21 against the defendants that closely track the allegations in  
22 this Indictment. The defendants seek relevant Rule 16 and  
23 Brady materials within the care, custody and control of the SEC  
24 pertaining to trading ahead and interpositioning activity  
25 during the relevant time period in the Indictment.

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1 As part of these materials, the defendants seek the  
2 OCIE report -- that is, the SEC Office of Compliance  
3 Inspections and Examinations -- report dated October 10, 2003,  
4 which concern the New York Stock Exchange surveillance of  
5 specialist trading firms during the relevant period as well as  
6 other materials.

7 The government responds that the documents are not in  
8 its custody, care or control and the documents are not material  
9 to the defense. The government says the SEC conducted two  
10 separate investigations -- sir?

11 MR. BARKOW: I'm sorry, your Honor. I don't mean to  
12 interrupt, but with respect to the OCIE report, before the  
13 Court went too far on this, the government is willing to

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14 produce that particular item.  
15 THE COURT: All right. I was about to say that the  
16 SEC conducted two separate investigations. You have already  
17 produced the first one.

18 MR. BARKOW: Well --

19 THE COURT: For one of the specialists.

20 MR. BARKOW: There are two separate investigations.

21 we have produced all SEC materials relating to the SEC  
22 investigation of specialists, and it is our position that we  
23 don't have the materials relating to the separate SEC  
24 investigation regarding the Stock Exchange except for the OCIE  
25 report --

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1 THE COURT: All right.  
2 MR. BARKOW: -- which we will produce.  
3 THE COURT: Turn the OCIE report over.  
4 what about the transcripts and the depositions that  
5 are taken in connection with the report?  
6 MR. BARKOW: That still is a live issue because we do  
7 not believe that that is something that we should produce at  
8 this point.

9 THE COURT: All right. What is your rationale for  
10 turning over the report but not the depositions taken in  
11 connection with it because it seems to me that the report,  
12 which is going to test the propriety of the timing of the 60  
13 seconds, 10 seconds, 15 seconds, that I do think it is  
14 material, is going to be based on the underlying depositions,  
15 how can you separate out one from the other? Or what is the  
16 theory of separating out one from the other?

17 MR. BARKOW: Well, first, your Honor, the -- if I  
18 could back up a little bit?

19 The report, as the Court knows, I think was ordered to  
20 be produced by Judge Chin, and we are taking the position that  
21 once we produce it there, we should also produce it here.

22 It is still our view that, although the Court  
23 disagrees, that the materiality of that is subject to question.

24 However, with respect to the deposition transcripts,  
25 that is not the sole basis for the OC report, that is 3500

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1 material, and people -- if people whose deposition transcripts  
2 were taken are going to testify, the government will produce  
3 the 3500 material at the appropriate time according to the  
4 Court's schedule or with the agreement of the parties in  
5 advance of the testimony. But this is classic 3500 material,  
6 the deposition transcripts.

7 The report synthesizes the results of the SEC's  
8 investigation from whatever sources. It was the government's  
9 view that it shouldn't be produced, but once it was ordered to  
10 be produced, we're willing to give it to these defendants as  
11 well, but they are distinct products from the deposition  
12 transcripts which cover a whole host of subjects and really are  
13 classic 3500 material.

14 THE COURT: I had thought that Judge Chin had ordered  
15 the production not only of the report but -- well, his words  
16 were, at least in the oral transcript I was given, along with

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17 any Stock Exchange response to the report, any memoranda or  
18 correspondence relating to it that are also in the possession,  
19 custody or control of the government.

20 MR. BARKOW: OK. Now I understand the Court's  
21 question.

22 There are two categories of information that these  
23 defendants are seeking and one relates to the report and one  
24 relates to transcripts. Judge Chin ordered production of the  
25 reports and if -- and this is the way the government read it,

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1 and I can represent to the Court, our conversations with  
2 defense counsel in the cases before Judge Chin, they did, as  
3 well -- if there were additional materials that related -- for  
4 example, correspondence about the report between the Stock  
5 Exchange and the SEC, that type of thing would have to be  
6 produced.

7 However, the government right now does not have  
8 anything in its possession, custody or control regarding the OC  
9 report other than the OC report itself, and so we are making  
10 inquiries of the Stock Exchange whether there are additional  
11 materials. I don't know the answer to that right now. But  
12 that's a separate category. The correspondence and report are  
13 one category and the deposition transcripts are another, and  
14 Judge Chin did not rule -- did not order us to produce the  
15 transcripts.

16 THE COURT: Are you saying you don't have the  
17 deposition transcripts?

18 MR. BARKOW: We do, but it is a separate -- the way  
19 that the issue was presented and argued before Judge Chin,  
20 there are two separate issues. One was the report and one was  
21 the transcripts. He ordered the production of the report and  
22 additionally said that if there was correspondence --

23 THE COURT: I understand.

24 MR. BARKOW: We do have transcripts. We do have  
25 transcripts. But that is not subject to Judge Chin's order and

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1 we are not producing it.

2 THE COURT: I understand now.

3 Tell me again what your rationale is for, if you are  
4 producing one, not producing the other, and I think your  
5 response has simply been classic 3500 material, and I don't  
6 think that directly addresses the point, because that says at  
7 some point we definitely are going to have to turn it over. I  
8 don't think it answers why it shouldn't be turned over now.

9 MR. BARKOW: Because, your Honor, we've given notice  
10 to the defendants and given them the names of witnesses who  
11 they might wish to speak to, in an abundance of caution, to  
12 identify those people who might say something that in our view  
13 is material to their defense. So we've identified for them by  
14 name those individuals and sent letters to them listing those  
15 individuals.

16 That without, over-generalizing, those individuals are  
17 the source of the information that is material to the  
18 defendants' defense.

19 The other individuals who testified in that

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20 investigation, there were a lot of subjects discussed in their  
21 testimony, and they are not sources of information, in our  
22 view, having reviewed the transcripts and having read them, of  
23 information that is remotely material to the defendants'  
24 defense, and, therefore, all they really are are prior  
25 statements of potential witnesses on subjects that may or may

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1 not be the subject, if they testify, of their testimony at  
2 trial.

3 And because it doesn't have -- because these  
4 transcripts don't have information that's material to their  
5 defense in the same sense that the OC report does, we view that  
6 as just a different category of information just like a grand  
7 jury transcript would be --

8 THE COURT: I understand.

9 Does anybody on the defense side want to respond on  
10 the issue of the transcripts? Because I have directed the OCIE  
11 report to be turned over, and, in any event, the government is  
12 going to do it based on Judge Chin's ruling and his  
13 determination that it should apply here as well.

14 Sir, Mr. Bach.

15 MR. BACH: Yes, your Honor.

16 I understood Mr. Barkow to be saying in the first  
17 instance that the government planned to produce these  
18 transcripts under Rule 3500.

19 THE COURT: To the extent they were 3500 material,  
20 correct.

21 MR. BACH: So that leaves open the possibility that  
22 there are transcripts that discuss the surveillance parameters  
23 that would not be disclosed to the defense pursuant to Rule  
24 3500. We think we are entitled to those now.

25 Rule 16 applies. Rule 16 is broader than Brady in

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1 this district. Barkow has given us Brady notice. In our view,  
2 that only serves to underscore the importance and materiality  
3 of these materials. This is a simple call because the  
4 government has these documents in its possession, and there is  
5 no question about access, there is no question about joint  
6 investigation. They have them. They are easy to produce, and  
7 we think we are entitled to them.

8 THE COURT: All right. Sir, did you want to respond?

9 MR. BARKOW: Your Honor, the simple fact that there is  
10 a lot of testimony here, there are a lot of individuals, and  
11 the simple fact that the trading ahead or interpositioning  
12 might have been mentioned in a transcript does not convert  
13 a transcript that is classic 3500 material, a detailed prior  
14 statement by a potential witness if they testify, into Rule 16  
15 material. Rule 16 contemplates this. Rule 26.2 contemplates  
16 this and says that Rule 16 is not an appropriate vehicle for  
17 the production of 3500 material.

18 The OC report is a different animal, and these are  
19 prior statements, some of them, of potential witnesses. The  
20 government reviewed these statements, and if there was anything  
21 in it that we thought that, in an abundance of caution, should  
22 be disclosable, we brought the witness's identity to the

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23 attention of the defendants , and we did do that for several  
24 people. But this is, in our view --  
25

MR . RIOPELLE: Judge --

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1 THE COURT: Let him finish.  
2

3 MR . BARKOW: In our view, your Honor, this is an  
4 essentially an early request for 3500 material.  
5

THE COURT: Thank you.

MR . RIOPELLE: Roland Riopelle.

6 They are only required to produce material for  
7 witnesses they call. Are they representing now on the record  
8 that they are going to call every person who was associated in  
9 some way with the preparation of this report? If not, what  
10 will happen is they have given us the names of witnesses who  
11 they believe have information that is material to our defense  
12 who have now refused to speak to us. They will not produce the  
13 material that they have in their hands that will tell us  
14 whether we should call those witnesses. They will not call  
15 those witnesses. They will therefore not produce that  
16 material, because it is not 3500 material, because they didn't  
17 call the witness, and we will never have access to it.

18 Your Honor, you know, the Assistant U.S. Attorney ,  
19 most respectfully, has stood up and told us that he has decided  
20 that some of this stuff is just not material to the defense. I  
21 am not sure he's tried a lot of defense cases. I hadn't when I  
22 was an Assistant U.S. Attorney, and I don't think it is fair to  
23 let him make that judgment for us.

24 We ought to get this material. We ought to be able to  
25 review it and decide who we are going to call. Giving us

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1 somebody's name whose lawyer tells us good bye and hangs up the  
2 phone on us is no substitute.

3 THE COURT: Yes, but you are only entitled to what  
4 Rule 16 entitles you to. You are not entitled to everything  
5 that exists in the government's files.

6 MR . RIOPELLE: Let me also add, your Honor, that with  
7 respect to this report, we may want to cross-examine a witness  
8 or two about it, and knowing what was said about it by all the  
9 people in the room when it was prepared is going to be material  
10 to that cross-examination, and that is squarely within Rule 16.

11 THE COURT: Go ahead.

12 MS . PEERCE: Your Honor, if I might just add? If your  
13 Honor has concluded that the report is material, I am a little  
14 bit confused as to how the government's position can be that  
15 the material that went into creating the report is not  
16 material.

17 THE COURT: That's why I was addressing my question to  
18 Mr. Barkow, and I think what he is saying is that the  
19 depositions may have touched simply briefly on this issue and,  
20 in fact, may contain a lot of material, a lot of information  
21 that is not part of the report.

22 Is that essentially correct?

23 MR . BARKOW: That is essentially correct, Judge.

24 MS . PEERCE: Then, your Honor, if there are parts in  
25 there that deal with the issues that are material to this case,

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2 are we not entitled to it now?  
3 MR. BARKOW: Your Honor, to draw an analogy, if we  
4 have a grand jury transcript of a witness who we don't call who  
5 talks about the subject matter of a defense, if what they say  
6 is not exculpatory, not material and doesn't get into detail in  
7 any way that is material to the preparation of the defense, it  
8 is not something that needs to be produced.  
9 THE COURT: It is a traditional issue that the defense  
10 is arguing: why should the adversary be deciding what is  
11 material?  
12 MR. BARKOW: Well, your Honor, I think with respect to  
13 transcripts in particular, and it is not just tradition and the  
14 practice of the courts in this district, it is the law because  
15 it is a prior statement by a potential witness, and the law is  
16 that that transcript doesn't need to be turned over, the prior  
17 statement, until after the direct testimony.  
18 We are not taking the position that we will wait until  
19 then, but that is a classic kind of impeachment --  
20 THE COURT: Mr. Rioelle is conceding that, but he is  
21 raising the issue of people who you may not call --  
22 MR. BARKOW: That is correct, your Honor.  
23 THE COURT: -- who have given material information.  
24 That is his point.  
25 MR. RIOELLE: That is exactly correct.  
MR. BARKOW: That is correct, your Honor.  
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2 And we have reviewed those transcripts, and I can  
3 represent to the Court, in our view, and I understand that, you  
4 know, this is just inherent to the situation, but in our view,  
5 we erred on the side of disclosure and we, in an abundance of  
6 caution, identified witnesses that the defendants might wish to  
7 speak to. That is a separate issue, then.  
8 THE COURT: I understand.  
9 Mr. Shapiro, go ahead. Last round.  
10 MR. SCHAPIRO: Just one final note, your Honor, and  
11 that is I think that the circumstance that Mr. Barkow is  
12 referring to when he talks about classic 3500, analogizing it  
13 to grand jury transcript, is quite different from what we have  
14 here today, because what we have today is transcripts that form  
15 the basis of a report that has already been determined to be  
16 material and that is being turned over to the defense. So we  
17 are not asking for grand jury transcripts. Grand jury is a  
18 very different situation governed by very different rules. We  
19 are not seeking those.  
20 These transcripts, the only thing they have in common  
21 with grand jury transcripts is that they are transcripts.  
22 Other than that, they are quite distinguishable.  
23 THE COURT: All right. I am going to --  
24 MR. BARKOW: Your Honor, if I may make two more  
25 points?  
THE COURT: Yes.  
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1 MR. BARKOW: One is the fact that the grand jury  
2 status is irrelevant, it could have been deposition transcript.  
3 But moreover, I submit to the Court, if the Court is inclined  
4 at this point to order disclosure of these, I would ask the  
5 Court to allow us to review them again, to submit something to  
6 the Court perhaps ex parte detailing what these witnesses said  
7 about these subjects, so that the Court can make a fully  
8 informed decision on this. Because in our view what we would  
9 be doing is giving to the defendants transcripts that we view  
10 as classic 3500 far in advance of trial, and we would ask the  
11 Court --

12 THE COURT: I understand. I actually was about to  
13 rule that they didn't have to be turned over, but I will take  
14 that government offer. All right? So why don't you make that  
15 submission to me and I will take a look at it. I guess you  
16 would want to do it ex parte.

17 MR. BARKOW: Yes, your Honor.

18 THE COURT: You certainly can. But what I was going  
19 to say is, on the representation that had been made about the  
20 fact that it is either 3500 material or it is not material, I  
21 was going to accept that representation. But I certainly will  
22 accept the additional information that the government so kindly  
23 offered.

24 MR. RIOPELLE: Can Mr. Barkow, your Honor, please  
25 state on the record whether he is actually going to call all of

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1 the people who are identified in the letters --

2 THE COURT: No, I am not going to ask the government  
3 to make that determination now. Let's move on.

4 The third area of documents requested is the New York  
5 Stock Exchange documents regarding the surveillance and  
6 monitoring practices.

7 MR. BACH: Judge, before we move on, if I could  
8 briefly address the existence of related correspondence and  
9 memoranda?

10 THE COURT: Go ahead.

11 MR. BACH: I think Mr. Barkow described two categories  
12 about that.

13 Within the possession of the SEC, we believe there is  
14 a wealth of correspondence and materials relating to some of  
15 the subjects addressed in the OCIE report that the government  
16 has acknowledged to be material. The OCIE report, we believe,  
17 was the culmination of a long back-and-forth between the SEC  
18 and the New York Stock Exchange. The inspection grew out of a  
19 series of discussions and the issues that had been addressed  
20 over a period of months and years, and we believe that there  
21 are documents in the government's possession and in the SEC's  
22 possession that talk about the surveillance parameters, whether  
23 they can be meaningfully produced without generating false  
24 positives, whether they can be --

25 THE COURT: Apparently the defense, which may not

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1 involve you ladies and gentlemen, and the government have  
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2 reached an understanding as to what the Chin order referred to  
3 in terms of the report and any memoranda or correspondence  
4 relating to it in the possession of the government; is that not  
5 so?

6 MR. BACH: We haven't discussed it. We haven't  
7 reached --

8 MR. BARKOW: I meant in the case before Judge Chin,  
9 your Honor.

10 THE COURT: All right. What is that understanding,  
11 again, in regard to the phrasing of memoranda or  
12 correspondence? I was, in my own mind, I had taken a very  
13 relatively narrow view of that, that is, things that would say  
14 here's the report. But go ahead.

15 MR. BARKOW: That is essentially the understanding  
16 that we have and I think the defense lawyers in the case before  
17 Judge Chin have. I think that Mr. Bach had a conversation with  
18 my co-counsel about this subject that I wasn't a party to, but  
19 I don't think we reached any agreements or understandings in  
20 interpreting that.

21 THE COURT: It seems to me that transmittal memos or  
22 something like that, I am not going to have them produce all of  
23 the backup information that related to the report. It is the  
24 report that is the central thing here.

25 Let's move on to the third area, and that is the Stock  
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1 Exchange documents regarding surveillance and monitoring  
2 practices, that is, the determination to use the timing of  
3 10/15 seconds rather than the 60 seconds.

4 Does the government have possession of those documents  
5 and have you reviewed them?

6 MR. BARKOW: No, your Honor. We have never seen them.

7 THE COURT: I wouldn't think so. That was the  
8 representation that was made in the other case.

9 I am going to hold this -- it is the same analysis as  
10 the screenshots themselves. No joint investigation. The  
11 government hasn't reviewed them. The government doesn't have  
12 access to them, doesn't possess them. So I'm going to deny the  
13 Rule 16 application. The same as the Rule 17 subpoenas, but,  
14 again, that is not in front of us.

15 Sir.

16 MR. MEISTER: Your Honor, David Meister.

17 May I just be heard briefly on that?

18 THE COURT: Yes, sure.

19 MR. MEISTER: As I heard your Honor's ruling with  
20 respect to the first category of documents, the screenshots,  
21 your Honor's decision was based on the notion that the  
22 government doesn't have access to the Stock Exchange's  
23 materials, and I think what your Honor said was --

24 THE COURT: And it wasn't a joint investigation. I  
25 wasn't limiting it to Rule 16, to joint investigations in terms

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1 of the government -- definition of "the government" but I went  
2 beyond. Go ahead.

3 MR. MEISTER: As I understood, your Honor said that if  
4 the government had access to the information, that maybe you

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5 would have come out differently, but your Honor concluded that  
6 the government did not have access because they didn't have  
7 sort of permission to --

8 THE COURT: Well, the SEC or the Stock Exchange, the  
9 third entity could say no, we don't want to give them to you.

10 MR. MEISTER: Your Honor, just on that point, I just  
11 want to bring one thing to your attention that maybe we haven't  
12 brought to your attention in all of our briefing, and that is  
13 that there is a Consent Order as between the SEC and the New  
14 York Stock Exchange that requires the New York Stock Exchange  
15 to provide any material that the SEC asks. They don't have a  
16 right to object.

17 And we can bring that Consent Order to your Honor's  
18 attention. I actually just read it myself this past week, and  
19 so it is our fault if we haven't brought the material to your  
20 attention to date. But it is not like the government or  
21 particularly the SEC, the SEC would have to go to a Court to  
22 seek permission to gain access to this material. The SEC has  
23 an open right to that material.

24 THE COURT: All right. The government in response  
25 could say, hey, the government does have access here because of

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1 this Consent Order of some kind.

2 MR. BARKOW: Your Honor, I don't have the Consent  
3 Order in front of me. I will make a few points about it,  
4 though.

5 First, that same Consent Order was brought to the  
6 attention of Judge Baer, and just so the Court is aware, and it  
7 did not persuade him and that litigation shifted to the Rule 17  
8 context.

9 Secondly, the access given --

10 THE COURT: To the extent the issue is whether or not  
11 the government has access regardless of Judge Baer's analysis,  
12 it seems to me that it may be relevant. So address that.

13 MR. BARKOW: Secondly, the -- again, I don't have it  
14 in front of me, but the Consent Decree gives access to the SEC,  
15 not to the U.S. Attorney's Office, and as part of this civil  
16 settlement.

17 And thirdly --

18 THE COURT: If that is so, that seems to me  
19 dispositive on this issue.

20 Go ahead.

21 MR. BARKOW: Well, and, thirdly, these documents  
22 relate to the investigation of the Stock Exchange, and that, as  
23 is set forth in the papers, is a wholly separate part of the  
24 SEC investigation than the investigation of the specialists.  
25 And so the wall that I think the Court recognized earlier in

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1 its decision between the two separate investigations, the SEC  
2 investigation of the specialists and the SEC investigation of  
3 the Stock Exchange, we have no contact at all. I can't even  
4 identify a name for the Court who the SEC people are who work  
5 on the investigation of the Stock Exchange. And so that's  
6 just -- it is not something that the U.S. Attorney's Office has  
7 access to because the SEC can make requests in connection with

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8 its Stock Exchange investigation.  
9 THE COURT: All right. I am adhering to the ruling  
10 that the defense can present the terms of that to me later on  
11 if they want and see if it changes anything.  
12 MR. MEISTER: Thank you, your Honor.  
13 MR. BARKOW: I think the Court is getting to the next  
14 issue, which is data for nonindicted stocks.  
15 THE COURT: Yes.  
16 MR. BARKOW: And before the Court gets there, I want  
17 to tell the Court that this has been -- I can't keep it  
18 straight right now, but in another case this has been ordered  
19 to be produced in the form that it currently exists, and we are  
20 willing to do that here as well, so long as that production is  
21 not viewed or taken as a concession on admissibility, because  
22 we do not believe -- we don't believe that it was necessarily  
23 appropriately produced, but we don't believe it is admissible,  
24 and so long as we can litigate that issue down the road.  
25 THE COURT: Turning things over now does not concede  
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1 admissibility. So given the fact that the government has  
2 agreed, and I think the papers indicate that the government has  
3 agreed, I don't have to rule on it. So those reports will be  
4 turned over.  
5 MR. BERKE: Judge, to the extent it is helpful and  
6 your Honor would like us to address it, I think it is fairly  
7 straightforward, the Consent Decree is an exhibit to our motion  
8 papers and I can pass up a copy to your Honor.  
9 THE COURT: Yes.  
10 MR. MEISTER: It looks like it is Exhibit 11.  
11 MR. BERKE: Exhibit 11 on our motion papers.  
12 THE COURT: I have it.  
13 What section do you want to address me to?  
14 MR. BERKE: Judge, if I can, it is toward the end of  
15 the document. It is the end of Section C, Paragraph 30. Then  
16 it lays out -- it is Paragraph 30. And it lays out all the  
17 things the Stock Exchange has agreed to do pursuant to this  
18 agreement.  
19 And if I could note, Judge, on 30A, one of it is "to  
20 produce any and all documents and information requested by the  
21 Commission's staff without subpoena."  
22 And in the preceding paragraph, it refers to --  
23 THE COURT: Wait just a moment.  
24 MR. BERKE: I'm sorry, Judge.  
25 (Pause)  
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1 THE COURT: Yes. Go ahead.  
2 MR. BERKE: And, Judge, if I can --  
3 THE COURT: That seems to me that that doesn't address  
4 the issue. What that says is the Stock Exchange will produce,  
5 without service of a subpoena, any documents that the SEC  
6 wants. Isn't that what that says?  
7 MR. BERKE: Yes.  
8 THE COURT: How does that address the issue before us  
9 here with regard to the Southern District of New York?  
10 MR. BERKE: Judge, if I can, I think there are three  
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11 steps here. As I understand, and we've outlined in our papers  
12 probably ad nauseam that there is this question that very much  
13 is going to be a subject at trial, what is appropriate time  
14 parameters in order to draw assumptions as to whether conduct  
15 was intentional.

16 The Stock Exchange had the time parameter that had  
17 been used prior to any investigation. The reafters, there is the  
18 SEC investigation of the New York Stock Exchange resulting in a  
19 variety of different things, including the OCI report that we  
20 have.

21 The OCI report, as we understand it, describes that  
22 the SEC determined that the appropriate time parameter was not  
23 the parameter historically used by the Exchange but rather the  
24 10 seconds and 15 seconds we've described, and they've done  
25 that based on all sorts of information that we don't have and I

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1 don't believe that we're going to have in response to the OCI  
2 report. That will just have, I believe, the conclusion and a  
3 description of how that conclusion was reached.

4 So what we're saying is the government -- the U.S.  
5 Attorney's Office now simply adopted what the SEC determined  
6 based on steps it took in connection with the New York Stock  
7 Exchange.

8 THE COURT: In terms of the time?

9 MR. BERKE: In terms of the time.

10 We are then left eventually saying we are going to  
11 have to cross-examine witnesses, we are going to argue at trial  
12 all about this 10 seconds, and we are not going to have any  
13 understanding or basis as to how they reached it. We believe  
14 there are documents that exist that will outline in great  
15 detail why the government believes this 10 seconds is  
16 appropriate and how the 10 seconds was reached in order to  
17 identify --

18 THE COURT: Not in the possession of the Southern  
19 District and the Southern District doesn't have access. This  
20 doesn't give the Southern District access, does it?

21 MR. BERKE: Judge, now what we are talking about is  
22 your Honor originally addressed whether or not the U.S.  
23 Attorney's Office has access to the quasi-public New York Stock  
24 Exchange. This is a step different. The SEC clearly has  
25 access to what is in the possession of the New York Stock

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1 Exchange on this issue we believe pursuant to the Consent  
2 Decree, and we would submit that the --

3 THE COURT: Say that again. I want to make sure that  
4 I am following it. That the SEC has access to the Stock  
5 Exchange on the basis of this document?

6 MR. BERKE: Exactly.

7 THE COURT: Right. Go ahead. I am with you.

8 MR. BERKE: We believe that the U.S. Attorney's Office  
9 has access to the documents in the possession of the SEC  
10 related to these issues. And I can go in greater detail why  
11 that is the case. I think is a very different analysis whether  
12 the U.S. Attorney's Office for the Southern District has access  
13 to documents in the possession of the SEC than whether they

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14 have access to documents in the possession of the New York  
15 Stock Exchange.

16 THE COURT: So you're in effect conceding the lack of  
17 access to the Stock Exchange but saying you can get there the  
18 same way by going through the SEC because the SEC, by virtue of  
19 this Consent Decree, can get them easily from the Stock  
20 Exchange.

21 MR. BERKE: With all respect, your Honor, I'm  
22 conceding your Honor's ruling on the issue of access to the  
23 Stock Exchange, but I am saying it is a much stronger position  
24 as to the SEC.

25 THE COURT: I understand. Go ahead.

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1 I don't think you get there, but if the government  
2 wants to concede this point, I will take it.

3 MR. BARKOW: I don't, your Honor, so maybe I should  
4 sit down on this one.

5 THE COURT: Say it, but make your record.

6 MR. BARKOW: The only thing I was going to stay in  
7 addition to what I had said before is the caption here I think  
8 illustrates my point. This is the investigation by the SEC of  
9 the Stock Exchange, not the specialists.

10 THE COURT: I don't think the defense gets there but I  
11 appreciate your argument, and I now better understand the use  
12 that you are trying to make of this Consent Decree. You just  
13 don't get there.

14 Let's turn to the bill of particulars.

15 Mr. Barkow, you have talked about trying to be  
16 consistent here between the cases, and because I clearly didn't  
17 have enough to read, Mr. Berke was kind enough to give me more  
18 today with this letter with the transcript from Judge Chin.

19 I take it, you are prepared to adopt your description  
20 of the allegations of what conduct is at issue as set forth  
21 there on page 9 and 10?

22 MR. BARKOW: You are referring, your Honor, to the  
23 Judge Chin transcript?

24 THE COURT: Yes.

25 MR. BARKOW: Yes.

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1 THE COURT: It is -- just so we are literally on the  
2 same page, it is the attachment to Mr. Berke's  
3 February 6th letter, and on the right-hand margin it looks like  
4 the pagination is page 9 of 10. It is your statement there  
5 beginning on line 18, page 9, to line 10, page 10.

6 MR. BARKOW: I am turning to that, your Honor, and I  
7 haven't gotten there yet, but what I said yesterday before  
8 Judge Chin I am ready to adhere to here.

9 THE COURT: Take a look at it.

10 MR. BARKOW: OK.

11 (Pause)

12 MS. GOLDBERG: I stand behind that statement, your  
13 Honor.

14 THE COURT: All right. All the parties here know that  
15 a bill of particulars is a discretionary matter for the Court,  
16 and the purpose is to provide sufficient information about the

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17 charge to enable a defendant to avoid unfair surprise or to  
18 preclude a second prosecution for the same offense. It is not  
19 for discovery purposes. It is not to force additional  
20 discovery. And everyone here knows the cases, United States v.  
21 Torres, United States v. Bortnovsky. The defendants contend  
22 the Indictment is insufficient because it doesn't specify the  
23 conduct that was illegal. They argue that it simply tracks the  
24 language of the statutes.

25 I do think that both in the Indictment and, as using  
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1 Mr. Barkow's statement before Judge Chin, the conduct that is  
2 alleged is quite clear, and I don't think the defense is  
3 entitled to further specificity here.

4 MR. MEISTER: Your Honor, may I be heard on that?

5 THE COURT: The co-defendants are a separate issue that  
6 the defendants wanted and began under Nachamie, United States  
7 v. Nachamie. I really don't think you are entitled to it. The  
8 issue is whether or not the co-conspirator's identity is  
9 necessary, not whether it would be helpful. And based on what  
10 the government says in its papers here, the unindicted  
11 co-conspirators are people that the defendants had been aware  
12 of, that they worked with as part of the alleged conspiracy.  
13 So I am not at this point going to require further  
14 specification or, specifically, names of unindicted  
15 co-conspirators.

16 Yes, sir, somebody wanted to say something?

17 MR. MEISTER: Yes, your Honor, just with respect to  
18 the nature of the crime.

19 I understand that your Honor -- or that Mr. Barkow is  
20 now relying on the statements he made to Judge Chin, I think it  
21 was just yesterday --

22 THE COURT: Yes. I don't think there is anything  
23 surprising about that and it just gives you further  
24 specification.

25 Go ahead.

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1 MR. MEISTER: It was, frankly, your Honor, it was  
2 surprising to us. It was the first time that we had heard the  
3 government say that, in part, its case was based on implied  
4 misrepresentations, or what the government has said -- the  
5 government did not say that in the brief to your Honor. What  
6 the government said in the brief to your Honor was that its  
7 case was -- that there are no affirmative misrepresentations  
8 made, that they were going to -- that the fraud was based on  
9 omissions of material facts.

10 THE COURT: "By trading ahead or interpositioning,  
11 their failure to say that they were going to do these things  
12 constitute omissions. So there are no particular false  
13 statements that can be identified, but the failure to inform  
14 the public that they were going to do these things constitute  
15 omissions, and that is what we have told defense counsel."

16 MR. MEISTER: Not implied misrepresentations. Your  
17 Honor, I believe --

18 THE COURT: What is your question?

19 MR. MEISTER: Your Honor, I guess my request, your

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20 Honor, is that --

21 THE COURT: I mean, go back earlier in the statement:  
22 "In the context of a bill of particulars, there were no  
23 particular false statements that we could identify because the  
24 false statements theory here is that the defendants made  
25 implied representations that they would not cheat customers,

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1 steal from customers wishing to trade on the Stock Exchange,"  
2 etc. I think the government is adhering to that. In other  
3 words, they implied that they weren't going to cheat, that they  
4 weren't requesting to interposition or trade in front, and that  
5 is the false statement; is that right, government?

6 MR. BARKOW: Yes, your Honor.

7 THE COURT: All right. It is straightforward. It  
8 seems to me it is straightforward.

9 MR. MEISTER: I guess, your Honor, what we would  
10 request is if the government could provide a bill that just  
11 states that? Your Honor, we have been following what the  
12 government has been saying from case to case and including in  
13 this case, and just from our point of view, the government  
14 changes or adds from time to time.

15 THE COURT: Well, you have this statement. You have  
16 the government sit before Judge Chin. You have the government  
17 now saying that's their theory of the case. I'm not going to  
18 require them to say it again.

19 All right.

20 MR. MEISTER: Yes, your Honor, just on the second  
21 point, if I can just be brief?

22 THE COURT: Go ahead.

23 MR. MEISTER: On the second point, I understand your  
24 Honor has said that, we'll, based on the government's  
25 representations, the seven defendants here should know the

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1 other co-conspirators because these were people who they worked  
2 with -- with whom they worked for some period of time.

3 I would just stress to your Honor there were hundreds  
4 of people who worked at VDM. And this is not your typical  
5 conspiracy case, Judge, where, for example, there is some sort  
6 of drug activity where everyone in the drug activity should  
7 know or should know of others who were participating in the  
8 same activity. We are talking about a large company, all of  
9 whom were working in the same type of environment essentially  
10 doing the same sort of trading, whether or not the government  
11 says it was illegal or not. We are honestly in the dark as to  
12 where the government draws the line.

13 THE COURT: All right. Mr. Barkow, why don't you  
14 respond to that, because what Mr. Meister has just said is that  
15 he is analogizing it to United States v. Strawberry, which was  
16 Judge Parker's decision where he directed that the names of  
17 co-conspirators be turned over because the defendant hadn't  
18 been present at the incriminating events. I think what the  
19 defense is just arguing is this is similar because when you've  
20 got a company with hundreds of people participating, the  
21 defendants are at sea.

22 Is that fair enough?

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23 MR. MEISTER: That is very well stated, your Honor,  
24 yes.  
25 MR. BARKOW: Your Honor, first, the drug analogy is  
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2 helpful to the government, because as opposed to a case  
3 involving narcotics distribution where you might have people  
4 who are in a wide network who don't know each other, who use  
5 nicknames, who don't have all that contact except for a few  
6 people at the top, here we have specialists who sat sometimes  
7 for years this close, right next to them, to their clerks, to  
8 their secondary clerks, to their backup clerks, who were  
9 supervised by their supervisors. So they have intimate  
knowledge of the people who were around them.

10 I recognize the company is a big company, but there  
11 may be unknown people, unknown to the defendants, who are also  
12 unknown co-conspirators. The government alleged  
13 co-conspirators known and unknown. I submit here that what is  
14 really at play here is that the defendants are attempting to  
15 get a witness list, because if we identify co-conspirators,  
16 there would be one particular type of co-conspirator who we  
17 identified that would be clerks. Those are the types of people  
18 who they worked with for years, who they know very well, and  
19 who sat right next to them for many months day after day after  
20 day. And it is just not the same as a drug conspiracy or even  
21 the conspiracy in Strawberry, where it might have pervaded some  
22 large entity. The conspirators know these defendants know.  
23 And so in the government's view this is a request for a witness  
24 list of people who they already know.

25 THE COURT: All right. I am not going to change my  
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2 decision.  
3 Is there anything else we need do today?  
4 MR. BARKOW: I have two things, your Honor.  
5 One just relates back to the Court's ruling, and I  
6 just want to get clarification of something for myself and for  
the Stock Exchange.

7 With respect to the screenshots, the government's  
8 proposal was to give the defendants access -- of actually  
9 really the Stock Exchange to give the defendants access to the  
10 SIAC facility for the screenshots.

11 THE COURT: On each of the days --  
12 MR. BARKOW: That is not my question. My question is  
13 just the physical location. Our proposal was to give them  
14 access and that they need to go to the facility. I think at  
15 some point the Court might have used the word "produced," that  
16 the government should produce the data, and I just want to be  
17 clear that the Court wasn't ordering us to get it and give it  
18 to them but instead the SIAC --

19 THE COURT: No. Given what I understand are the  
20 mechanics and time involved, no, I am not asking the government  
21 to do that.

22 MR. BARKOW: That was one question.  
23 And the other one I guess is something that will  
24 probably inevitably come up, but the government would like to  
25 inquire, through the Court of the defendants and to the Court

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2 itself: We have a trial date of May 1st. We will be ready to  
3 go on that date, we are preparing for trial now. But what we  
4 would like to avoid -- this is a large case, there is a lot of  
5 preparation here -- we don't know whether the defendants truly  
6 intend to go, and we would like to know now whether that is a  
7 date that we're committed to to go to trial or -- and if it is  
8 not, we would like to change it now, and if it is, we would  
like to keep it and stick with it.

9 THE COURT: I understand.  
10 Defendants, are you ready to go on May 1, because the  
11 Court is ready to go on May 1?

12 MR. BERKE: Judge, if I can address some issues?  
13 Let me say that the defendants requested a trial in  
14 May because we would like to try the case in May. I think  
15 there are a couple of issues that we wanted to raise with your  
16 Honor that certainly impact on whether a trial is in May,  
17 whether we may need a few extra weeks, if your Honor's schedule  
18 permitted it, and we are inclined to entertain that.

19 One of the things that concerns us about the  
20 government's offer regarding SIAC is we understand that in  
21 order to access this data, the government has put a tremendous  
22 amount of restrictions on what our experts will be permitted to  
23 do in accessing this data. We certainly appreciate the  
24 confidentiality, proprietary issues and are prepared,  
25 obviously, to enter into a very stringent confidentiality

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2 order, as we have done relating to other documents.  
3 But what the government has said were the conditions  
4 for accessing the material essentially would preclude our  
5 experts from removing any of the materials that they review  
6 during their visit to SIAC, from bringing any computers in  
7 which, again, deal with computer data. That is essentially  
8 what experts use in order to be able to look and work and try  
to make sense of this data.

9 They would -- the expert is prohibited under what they  
10 offer, would be prohibited from reproducing, recording, reverse  
11 engineering, making derivative works or compiling or  
12 decompiling any computer code or program related to the display  
13 book materials.

14 One of the key purposes for accessing the material --  
15 I'm sorry, for accessing the material would be to do just that,  
16 to be able to in fact test what the government has done on  
17 display books screenshots to see if in fact that is accurate,  
18 reliable, etc., and to do other things that we have identified  
19 in our papers. So that the conditions that have been attached  
20 would not only extraordinarily delay the process of making use  
21 of the material but would also essentially render it largely,  
22 we believe, you know, if not ineffective, not particularly  
23 effective.

24 THE COURT: Have you talked to each other about this?  
25 MR. BERKE: Well, we had a discussion with --

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1 THE COURT: Because I can start going into it. I  
2 mean, I would have to be educated on the computer aspect of it.

3 In general, it seems to me that the experts have to be  
4 allowed to manipulate the data they see. That's what experts  
5 do. And presumably the Stock Exchange wouldn't want that  
6 manipulation to occur in their computers.

7 So I would think the experts would have to be able to  
8 manipulate the data on their own computers. But, you know, I  
9 don't think I could take it to much greater depth or  
10 sophistication. That is just my general sense. I think the  
11 parties ought to talk about the issue before presenting it to  
12 me. So I am just asking whether or not you have talked to each  
13 other.

14 MR. BERKE: Here is what I would suggest, Judge. I  
15 had a conversation with Ms. Goldberg, Mr. Barkow's colleague on  
16 this case, very early on when this offer was made, and it was  
17 clear in our discussion that we were not going to reach  
18 agreement about what they are offering. The issue has  
19 essentially been in abeyance while we have been litigating  
20 these issues. I think it does make sense and we are happy to  
21 have those conversations forthwith.

22 Based on subsequent conversation I did have with  
23 Ms. Goldberg, I believe we probably are going to end up  
24 agreeing to disagree about some fairly core issues, but I agree  
25 it makes sense, before we present the substance of the

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1 disagreement, to discuss further, in light of your Honor's  
2 ruling and --

3 THE COURT: What you want to be able to do, or what I  
4 want the parties to be able to do, is for the experts to be  
5 able to have access to the data to be able to manipulate it in  
6 any way they want without interfering with the New York stock  
7 Exchange's proprietary system or database and for it all to be  
8 held within the parameters of this case and not used for any  
9 other purpose. It seems to me that's where we all want to end  
10 up.

11 Sir.

12 MR. BARKOW: Yes, your Honor.

13 Your Honor, the agreement to which Mr. Berke is  
14 referring is very detailed. It has been entered into in  
15 virtually all of the cases that are pending that are related;  
16 in fact, perhaps all. We are walled off, actually, from the  
17 agreement so I don't know exactly what the status is. But it  
18 is very detailed, and it is designed to protect the proprietary  
19 nature of the Stock Exchange's information.

20 Without getting into detail, one of the core elements  
21 of that is that the defendants' experts do their work at the  
22 facility on the computers that are at the facility and that  
23 belong to the Stock Exchange. When they are there, they can do  
24 all the things that these defendants want to do. They can make  
25 their own screenshots. They can make screenshots for an entire

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1 day. They can deconstruct and delve beneath the screenshots

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2 that we've produced. They can do -- they can make screenshots  
3 40 times longer than the ones we have. They can attempt to rip  
4 down the screenshots. They can do everything I think that they  
5 want to do, but they need to do it on the SIAC or NYSE  
6 computers.

7 THE COURT: Is there then something built into the  
8 system so everyone knows the Stock Exchange is not then going  
9 to get access to that information if it is on their own  
10 computers?

11 MR. BARKOW: Well, we are walled off, Ms. Goldberg and  
12 I are and the agent and I think -- I don't have the agreement  
13 in front of me but I think the SEC are walled off from the work  
14 product that is done at the facility, and so because of  
15 proprietary concerns, the Stock Exchange's counsel has a review  
16 mechanism in place to make sure that no proprietary information  
17 is taken out, but we're walled off from that.

18 We're even walled off from the identity of the experts  
19 who go in and perhaps some other things, as well, and that's  
20 why I don't even know who sent in the agreements because I'm  
21 walled off from it. So I want to put that out there.

22 This is a very stringent agreement. It was drafted by  
23 the Stock Exchange and it is extremely important to them, but  
24 we think -- I've seen the facility, accompanied by SIAC's  
25 security, and it is a private facility. There are three

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1 computers there, and they will sign up for time. Their expert  
2 will sign up for time. Lawyers can go with them, and they will  
3 be able to do everything they need to do but they will have to  
4 do it there.

5 If I can add one other point? Because of that  
6 agreement, one of the factors in the agreement is that the  
7 defendants' experts, as well as the defense counsel, have to  
8 get security clearance by SIAC to go in and out on their own  
9 time. So they can get IDs. That is a several-week process and  
10 because of the pendency of the dispute over screenshots, the  
11 experts will not actually physically be in SIAC doing this work  
12 for a few weeks.

13 Once they do that, there are defendants in other cases  
14 who are signing up for access to this facility. I think they  
15 are sharing experts, but, again, I don't know because I am  
16 walled off so there are not as many experts as there are  
17 defendants. But there is going to be competition for the space  
18 and basically hours of the full business day but not  
19 necessarily what, you know, the kind of 24-hour approach that  
20 they might want to do.

21 We haven't had conversations with these defendants  
22 about this in detail because of the pendency of the dispute  
23 over what they should have access to. Now that it's resolved,  
24 we will be ready and we would like to go to trial on May 1st.

25 I don't know that they are going to be able to do the  
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1 things that they want to do by then, but it is our request that  
2 we decide that issue now because we basically are already  
3 preparing for trial and need to continue to do so now. But I  
4 don't think they are going to get there for a few weeks.

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5 THE COURT: I think the discussion of the proposed  
6 agreement is premature until the parties talk more about it and  
7 see what can be worked out among them.

8 I think the request is fair, as I understand it. The  
9 trial date has been set for May 1. The Court is ready to try  
10 it on May 1, and the government is saying are the defendants  
11 serious about May 1. If so, they will know that. But if the  
12 defendants are not serious about May 1, the government wants to  
13 know that as well, and then presumably the parties will see  
14 whether the Judge is serious about May 1.

15 Yes, sir.

16 MR. BERKE: Judge, let me tell you where we are.

17 We are serious about a date May 1 or shortly  
18 thereafter. I say "shortly thereafter." We have been talking  
19 May 1, May 15, possibly even June 1st, your Honor's schedule  
20 obviously permitting. Everyone is anxious to try this case.

21 For us, the issue is we do know about this agreement.  
22 I should say that the other defendants that have entered into  
23 it have done it not exclusively. I think they specifically  
24 said they'll take it as a first step, although they are  
25 reserving all their rights to say it is completely inadequate,

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1 etc. I don't think any expert has been in yet to look at the  
2 materials.

3 THE COURT: Let's start getting it underway. I think  
4 you all have more knowledge about that than I do, obviously,  
5 because you are talking to your co-defense counsel. Let's get  
6 those clearances underway as quickly as we can, because I would  
7 like to adhere to that May 1 date.

8 Go ahead.

9 MR. BERKE: Judge, the first of my two-part question:  
10 Can we schedule a conference perhaps in three weeks to come  
11 back before your Honor? Obviously, I think we will start  
12 talking today about getting our people into SIAC as soon as  
13 possible. I am hopeful it can be much quicker, as a way to  
14 expedite this process, and then report back to you where we  
15 stand because the delay --

16 THE COURT: I will do it in ten days. Why wait three  
17 weeks?

18 MR. BERKE: That is fine, your Honor. I am saying  
19 three weeks because I would like it to be the day after our  
20 experts actually see what is being offered at SIAC, and I  
21 just -- my hope is that in three weeks, they would be in and  
22 actually look at it. If we can do it within ten days, as  
23 quickly as the government believes we may have access to it, we  
24 will do it.

25 MR. BARKOW: Your Honor, the process has been on going  
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1 for more than ten days for every other defendant who has been  
2 engaged, and no one has gone there yet.

3 One of the things that has to happen is the experts  
4 and all the other people who wish to enter need to get  
5 fingerprinted, and those fingerprints need to be sent to a  
6 background check. They need to make two I think trips to the  
7 facility and one to another one to go through various stages.

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8 And it just -- I know that there is one group of defendants  
9 that started this procedure a few weeks ago and they are not  
10 done. I think they are close to going but nobody has gone --  
11 THE COURT: Let me urge you all --

12 MR. BARKOW: I just don't think it is going to happen  
13 in ten days.

14 THE COURT: OK. I want to try this case on May 1. I  
15 want to get it moving. The defendants have a right to a speedy  
16 trial. You have heard Mr. Berke articulate several times his  
17 clients want to go to trial. Let's let him have his speedy  
18 trial rights. The government has said that it wants to go to  
19 trial as well.

20 May 1 it is.

21 Now, we have to work backwards from that. I urge the  
22 parties not to be just paying lip service to wanting to go to  
23 trial but to actually act consistent with that articulation.  
24 And what that means is pushing against the bureaucracy. It  
25 shouldn't take -- I understand sometimes it just does, but it

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1 shouldn't take a great deal of time to get these clearances.  
2 Somebody can walk the fingerprints through to wherever they  
3 need to go. Both the government and the defense have enormous  
4 resources here. Just push through on these procedural hurdles  
5 so we can get those experts in there.

6 MR. BARKOW: Your Honor, I just want to be clear, it  
7 is not government bureaucracy. This is a Stock Exchange SIAC  
8 process that we do not control, and we have been -- and they  
9 are working hard on it. I don't want to say that they are not.  
10 But we have been -- there is a lot of things that they are  
11 doing that have nothing to do with this case, and we cannot  
12 just cut through the bureaucracy as we can perhaps if it were a  
13 government bureaucracy.

14 THE COURT: I can't do anything except repeat myself.  
15 Go to them. Say, I represent the United States government.  
16 See what that does. Tell them you've got a crazed judge who is  
17 going to trial on May 1 and it is very important that this case  
18 move forward. Tell them you don't want to come back in front  
19 of that judge again and say I couldn't get the New York Stock  
20 Exchange to take fingerprints. Do what is necessary within the  
21 facts.

22 MR. BERKE: Judge, can I say first, because I want to  
23 make sure that I wasn't misunderstood and I didn't misspeak,  
24 because I am mindful of the fact that I am also not speaking  
25 only on behalf of my client but of the fact that I am speaking

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1 for many other lawyers in the room, sparing your Honor from  
2 hearing everybody speak, and what I was intending to convey is  
3 that people want to go to trial in May. The question is can  
4 we, given these issues with the data, and because, obviously,  
5 we need to have the data that is underlying much of the  
6 government's proof.

7 And the question I ask your Honor is really two-fold.  
8 One, would your Honor be able to entertain a request for a  
9 trial date that began on May 15th or June 1st, number one? And  
10 number two, could I have a minute to confer with other counsel

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11 regarding the discussions we have had today? I think there has  
12 been quite a bit of additional information for us about the  
13 trial date issue, because, obviously, I think our one concern  
14 is while we want to go to trial, we want to go to trial with  
15 the material we need to be prepared to present to your Honor.

16 THE COURT: I understand that, but what I'm trying to  
17 determine is whether the defense is speaking with forked tongue  
18 in regard to the trial date, because very often defense  
19 attorneys want to go to trial, on the one hand, and on the  
20 other hand, that is the last thing they want to do.

21 So if you genuinely want to go to trial on May 1, or  
22 May 15, that kind of two-week period I can live with, the  
23 parties will work to make sure that happens. And that's my  
24 current intention. Do I have a window there? Of course I have  
25 a window.

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1 But what I don't want to see happen is, you know, a  
2 month down the line we suddenly find that there are motions  
3 that are going to take months to brief and so the May 1 date is  
4 absolutely impossible. I think that would be unfair to the  
5 Court and it would be unfair to the government.

6 If we are working to May 1, or a couple of weeks  
7 either way, that's OK

8 MR. BERKE: Your Honor, if I may lay it out? I assure  
9 you, you will never have to worry about either me or I think  
10 anyone else in this case speaking to you with forked tongue  
11 about trial date or anything else, and I understand your  
12 Honor's concern that we are trying to gain some strategic  
13 advantage through that date and I assure you we are not.

14 THE COURT: No, it is not a question of strategic  
15 advantage in so much as let's set a date and let everybody work  
16 consistent with that date and get this trial on and have a jury  
17 determine the facts.

18 MR. BERKE: What I think may be useful, your Honor, if  
19 I could try your Honor's patience for just a minute or two, is  
20 just to lay out: We've spent many hours as a group discussing  
21 these very issues, and I can assure you that when I came and  
22 said that we would like to try it whether it is May 15th or  
23 June 1st, I meant it, and that was based on these discussions.

24 I think what may be helpful is for us to lay out to  
25 you the issues as we've identified them in our own discussions

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1 that relate to that question.

2 THE COURT: The trial date is May 1 or May 15. That's  
3 what we are talking about.

4 Go ahead. Talk amongst --

5 MR. BERKE: Your Honor, if I may have a minute?

6 THE COURT: Talk amongst yourselves.

7 MR. BARKOW: Your Honor, if I may --

8 THE COURT: I don't think you are a part of that.

9 MR. BARKOW: Can I ask you a question?

10 MR. BERKE: Yes.

11 (Discussion off the record)

12 MR. BERKE: Judge, thank you for your patience. We  
13 appreciate it.

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14 Judge, in addition to the data issue, which I think  
15 I've said enough about, Mr. Shapiro outlined sort of the other  
16 things that we anticipate, just so your Honor knows what we  
17 know. But first --

18 MR. SCHAPIRO: First, we accept May 15th. We are very  
19 happy with May 15th.

20 THE COURT: No, no. May 1 or two weeks thereafter.  
21 So our window is May 1 to May 15.

22 MR. SCHAPIRO: That is perfect. We are very happy  
23 with that, your Honor, and we think we can do that.

24 And just so that there is no confusion, your Honor, we  
25 just want to lay out a couple of things that will happen

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1 between now and then. If the Court wants to set a schedule, we  
2 can do it now, or otherwise we can raise these as seems  
3 appropriate, but I want to flag them to the Court.

4 THE COURT: Go ahead.

5 MR. SCHAPIRO: In between now and trial, among the  
6 things that we anticipate happening, we expect to file a motion  
7 pertaining to the government's Brady disclosure. We think we  
8 can do that quite soon, quite soon. If the Court wants to set  
9 a schedule, fine. Otherwise, we will do it as soon as we can  
10 and that is coming down the pike.

11 we expect to file our motion to dismiss -- I can't  
12 guarantee that we'll do it but we strongly expect that we  
13 will -- based on the theory of the case as laid out by the  
14 government before Judge Chin yesterday. Because while the  
15 Court has ruled that that provides us with enough particularity  
16 concerning the conduct that happened, we believe it doesn't  
17 actually state a crime.

18 Third, we anticipate that there is a reasonable  
19 likelihood, depending on what turns out from the SIAC  
20 investigation by our experts, of a Daubert hearing as to the  
21 admissibility of the screen shots. That is going to have to  
22 happen sometime between now and the trial, but, obviously, that  
23 can't happen until after our experts have spent some time at  
24 SIAC.

25 we would like to approach the Court about early 3500  
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1 material. We are all trying to move forward in a constructive  
2 way, be ready for trial between May 1st and two weeks  
3 thereafter. We think everyone is advantaged by having 3500  
4 material early. And this being a white-collar case, where  
5 there is no accusation of violence or threats, we think that  
6 one of our countervailing concerns that are outweighed by the  
7 advantage we would have to gain or may have by getting piles of  
8 transcripts for my imagination is 15, 16, 17 clerks, not to  
9 mention all the people who Mr. Barkow has told us he will  
10 produce with respect to their 3500 material, not to mention  
11 others who testified in depositions. I gather, from what  
12 Mr. Barkow said earlier today, that there are a variety of  
13 witnesses who testified before the SEC or whose deposition  
14 transcripts the government has and he said that it's classic  
15 3500 material. So we would like to have that in time to make  
16 good use of it.

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17 Then finally 17(c) subpoenas. It is obviously  
18 possible that some of the parties or entities who we subpoena  
19 will litigate the subpoenas, and so we want to make sure that  
20 time is built in for that. We obviously didn't want to start  
21 subpoenaing until we had your Honor's rulings on discovery,  
22 because if Rule 16 covers certain matters, we didn't want to  
23 send out Rule 17 subpoenas. So that is one other issue.

24 Those seem to us to be the main things that will need  
25 to be resolved between now and the beginning of our trial on

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1 May 1st or two weeks thereafter.

2 THE COURT: Well, it is an awful lot. When do you  
3 plan to make the motion to dismiss?

4 MR. SCHAPIRO: Your Honor, I think we can have that --  
5 we can have our brief and our motion in 21 days from now.

6 THE COURT: March 1.

7 The government, do you have a sense of how long you  
8 will need to respond?

9 MR. BARKOW: Your Honor, I guess if they take three  
10 weeks to write them, we would like to have three weeks to  
11 reply, then.

12 THE COURT: March 22 for the response. For reply,  
13 March 31.

14 It may be more realistic to make it May 15. I am just  
15 trying to be as realistic as possible because I am not going to  
16 be able to dig into it until April if we are talking May 1.

17 Is the government's estimation still approximately  
18 three months?

19 MR. BARKOW: Well, your Honor, I think that was the  
20 combination of the government's case and the defense case  
21 because our estimate was six to eight weeks. So for our case.

22 THE COURT: And I think it is more realistic to make  
23 it May 15. We won't be shooting for May 1 because I am going  
24 to need time on that motion to dismiss.

25 If there are going to be Rule 17(c) subpoenas, but you  
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1 heard what I said as part of that, obviously get them out as  
2 soon as you feel you can. Talk to each other about the 3500  
3 material. I don't think we can do anything on a Daubert  
4 hearing until you get your experts in there and know more about  
5 it. Make your Brady disclosure motion as soon as you can.

6 Now, in regard to getting the experts into the SIAC  
7 facility, the government, you said really ten days didn't make  
8 sense, so when do you want to do it for a status report?

9 MR. BARKOW: Your Honor, if the defendants are going  
10 to submit -- if they are not going to negotiate any terms in  
11 the agreement and they are going to start submitting signed  
12 agreements tonight to the Stock Exchange, not to us because we  
13 don't get them, then I think my impression is that the  
14 background check takes -- can I have a moment because there is  
15 actually someone here from the Stock Exchange in the back?

16 THE COURT: Yes, sure.

17 (Pause)

18 MR. BARKOW: Your Honor, what I propose is that --  
19 again, this is premised on the notion that the agreements are

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20 sent to the Stock Exchange later today or tomorrow -- that we  
21 set a date for two weeks and if it slides a day or so, then we  
22 could tell the Court.

23 THE COURT: Let's do it.

24 MR. BARKOW: Although, your Honor, I was told that  
25 that is the belief of the Stock Exchange as to the fastest they

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1 will be able to process this.

2 THE COURT: Let's make it February 22. Let's make it  
3 9 a.m. I have a trial but we will make it 9 a.m.

4 MS. PEERCE: Your Honor, I think a number of us have  
5 school break week that week. I am just looking at my own  
6 calendar.

7 MR. MEISTER: She is the bravest one of us all.

8 MS. PEERCE: I am the mother in the room, your Honor.

9 THE COURT: Well, that better gives the Stock Exchange  
10 a little more time.

11 February 27.

12 MS. PEERCE: Thank you.

13 THE COURT: So February 27th. Let's do it at 12:30.  
14 I will break the trial just before lunch. February 27th at  
15 12:30 for a status report.

16 Now, I don't know what the trial schedules are on the  
17 other cases, government, but perhaps the Stock Exchange can  
18 provide access to the experts based on trial dates. I don't  
19 know how the Stock Exchange is going to negotiate it if there  
20 are lots of different experts. Maybe the defense is sharing  
21 experts. But I put that out so that maybe we can get the  
22 experts in this case in and then out expeditiously.

23 Since you indicated that somebody is here from the  
24 Stock Exchange, you can see that the Court is interested in  
25 getting this case on for trial, and I would appreciate anything

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1 the Stock Exchange can do to expedite access to the materials.  
2 It obviously should feel comfortable in terms of that its  
3 proprietary information is being kept proprietary, but I would  
4 appreciate anything to give these experts the amount of time  
5 and access to the facilities that they need in order for us to  
6 get this case ready for trial.

7 Thank you.

8 Government.

9 MR. BERKE: Judge, as to the agreement, we will begin  
10 speaking to the government immediately, including tomorrow,  
11 and, hopefully, either reach agreement hopefully tomorrow or  
12 figure out what we don't agree on and can agree on. And if we  
13 reach the unfortunate position that we can't agree, would your  
14 Honor be open to us contacting your Honor to appear before you  
15 by phone or in person, however you prefer, to work out the  
16 issues as quickly as possible?

17 THE COURT: We won't do it by phone, but we will do it  
18 in person. And to the extent there are computer issues,  
19 somebody is going to have to educate me on them. But, yes, I  
20 am here if there is a dispute. Try not to have a dispute. If  
21 there is one, I will handle it.

22 MR. BERKE: Thank you, your Honor.

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23 THE COURT: OK.  
24 MR. BARKOW: Your Honor, I would ask that the Court  
25 exclude time between now and the trial date in the interest of  
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2 justice.  
3 THE COURT: Defense counsel, on the record?  
4 MS. PEERCE: No objection, your Honor.  
5 MR. RIOPELLE: No objection, Judge.  
6 MR. BROWN: No objection, your Honor.  
7 MR. MEISTER: No objection.  
8 MR. BACH: No objection.  
9 MR. SCHAPIRO: No objection.  
10 MR. BERKE: No objection.

11 THE COURT: With the motion having been made by the  
12 government for an exclusion of time pursuant to the Speedy  
13 Trial Act from today until May 15th, the date of trial, having  
14 been made and each of the defendants specifically stating they  
15 have no objection, I hereby exclude time from today until  
May 15th pursuant to 18 U.S.C. 3161(h)(8)(A).

16 The purpose of the exclusion is for continuity of  
17 counsel as well as for trial preparation. There are going to  
18 be motions, apparently. During the pendency of those motions,  
19 there will be additional automatic exclusions, but this is to  
20 each and any exclusion. I make the finding that the ends of  
21 justice outweigh the interests of the public and each of the  
22 defendants in a speedy trial, given the significant material  
23 that has to be processed and the work involved for counsel on  
24 both sides to prepare for trial.

25 All right. Thank you. I will see you on the next  
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1 627dbonc  
2 date.  
3 ALL COUNSEL: Thank you, your Honor.  
4 THE CLERK: All rise.  
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627DBONC.txt  
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